District Council of Plasterers and Cement Masons of Northern California, and Cement Masons Local 337, both affiliated with Operative Plasterers and Cement Masons International Association *and* Marina Concrete Company. Case 32–CB–2719

October 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 29, 1989, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondents filed exceptions and a supporting brief, the Charging Party filed an answering brief to the Respondents' exceptions, and the General Counsel filed a letter in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions, briefs, and letter and has decided to affirm the judge's rulings, findings, and conclusions, to modify the remedy,[1] and to adopt the recommended Order, as modified.

The judge found the issues in this case to be: (1) whether the Employer successfully repudiated its collective-bargaining relationship with the Respondents so as to effectively withdraw recognition of the Respondents following the expiration of the collective-bargaining agreement; (2) whether the Respondents violated Section 8(b)(1)(A) and (2) of the Act by filing grievances against the Employer in an attempt to enforce the union-security provisions of either the old or the new agreements between the Respondents and the Associated General Contractors (AGC); and (3) whether the complaint is barred by Section 10(b) of the Act.[2] The judge determined, and we agree, that the Employer successfully repudiated its bargaining relationship with the Respondents and that the Respondents violated the Act by seeking to enforce certain provisions of the expired collective-bargaining agreement.

Factual Findings

The pertinent background facts are as follows. Marina Concrete Company (Employer), is a subcontractor providing concrete to construction industry employers in the Salinas, California area. The Employer had a collective-bargaining relationship with Cement Masons Local 337 (Respondent Local) from 1971 until 1986. Near the end of 1972, the Employer became bound by the AGC collective-bargaining agreement with the Respondent Local, negotiated for the Respondent Local by the Plasterers and Cement Masons of Northern California (Respondent District Council). In January 1986, the Employer became a member of the AGC.

In September 1983, the Employer signed the collective-bargaining agreement between the Respondent Local and the AGC, effective from April 1984, through June 15, 1986. The agreement provided that it continued from year to year unless written cancellation was given 60 days prior to June 15, 1986.

In July 1985, the Respondent District Council and the AGC entered into ''talks.'' The parties executed a memorandum characterizing the talks as off-the-record, exploratory discussions preceding the formal opening of collective-bargaining negotiations, and as nonbinding, in the absence of approval and ratification by the Union and the AGC. The memorandum provided that the discussions would not constitute collective-bargaining negotiations as set forth in section 19 of the 1983–1986 AGC-Cement Masons Agreement.

The discussions concluded in the last week of January 1986,[3] at which time the parties had reached a tentative agreement. The AGC notified its members that those who did not wish to be bound by the agreement had until March 15 to withdraw bargaining authorization from the AGC. According to credited and uncontroverted testimony of the AGC representative, Thomas Holsman, March 15 had been agreed on between representatives of the AGC and the Respondent District Council. The AGC also advised its members that they had to continue to abide by the 1983–1986 agreement until its expiration, and that thereafter they had to bargain with the Union individually.

The Employer advised the AGC by telegram dated March 13, which was received March 14, that it would ''not be a party in any way, shape or form to any and/or all agreements'' entered into between the AGC and the Respondent District Council. On March 19, the AGC advised the District Council that the Employer would no longer be represented by it. On April 1, the Employer confirmed to the AGC that it was withdrawing bargaining authorization from it, and that it would not be bound by any new agreement. The Employer also confirmed to the District Council that it had revoked the AGC's authority ''to represent this company in any and all collective-bargaining or labor relations matters with your organization'' and that it would not be bound by any new agreement, by any extension, renewal, or amendment to the old agreement, or by ''any other labor agreements with your organization.'' In its letter the Employer advised the District Council that it

[1] Interest payments are to be made as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[2] For the reasons stated by the judge, we adopt the judge's finding that the complaint is not time barred. Accordingly, the Respondent District Council's filing, maintaining, and seeking to enforce its March 25, 1987 grievance against the Employer, and the Respondent Local's maintaining and seeking to enforce its September 1986 grievance against the Employer, which had effectively repudiated its bargaining relationship with the Respondents, in an effort to enforce the union security provisions of an expired collective-bargaining agreement, violated Sec. 8(b)(1)(A) and (2) of the Act.

[3] All dates hereafter are in 1986 unless otherwise indicated.

would be willing to meet as an individual employer. On the same day, the Employer sent a nearly identical letter to the Respondent Local.

On April 18, the AGC provided the District Council with a list of AGC members who had authorized it to represent them in collective bargaining for the new agreement. The Employer's name was not on the list. AGC Representative Holsman spoke to District Council Representative Hernandez, chairman of the District Council's negotiating committee, who told Holsman that the District Council had no problem with the list.

On April 10, the Respondent District Council wrote to the Employer and, acknowledging the Employer's April 1 letter, asked the Employer to provide it with certain information. By letter of April 25, the Employer provided certain of the information requested by the Respondent District Council, including the identity of the spokesperson for the Employer ''during these negotiations.'' The letter also included some employer wage and benefit proposals. The Employer closed its letter by stating, ''[I]f you do not wish to comply with these terms and demands as they are stated here, then on June 15, 1986, this company will no longer be bound in anyway with your Union.'' On May 22, the Respondent District Council's attorneys wrote the Employer that, ''In response to your letter of April 25, 1986, if you do not submit the requested information we will file appropriate legal action and sue . . . .'' No negotiations occurred and on June 15 the collective-bargaining agreement expired.

On September 23, Respondent Local wrote to the Employer requesting that it

> comply with the provisions of Section 3(A)(2) of the Cement Masons 46 Northern California Counties Master Agreement by discharging the individual named below for failure to comply with the provisions of Section 3(A)(1) of said Agreement in that said individual has failed to remain and/or maintain membership in good standing with the Union.

The agreement referred to was the new 1986–1989 agreement and section 3(A)(1) was the union-security clause of that agreement. The individual ''named'' was Ron Bell and he was not discharged. On September 26, the Respondent Local's business agent filed a grievance against the Employer because it failed to discharge Bell. The grievance sought ''compliance with the agreement in the future, backpay . . . , and reimbursement to the Union of lost dues and initiation fees.'' A copy of the grievance was sent to the Employer on October 2. On December 23, the Respondent Local took the grievance before the Contract Administration Board of Adjustment for resolution. The Board of Adjustment is a bipartite body to which contractual disputes are submitted. The Employer did not appear at the Board of Adjustment hearing. On December 12, the Employer wrote to Hernandez of the District Council, and made what the judge described as ''sarcastic'' reference to its letter of April 25, stating,

> I'm so glad you have accepted my contract offer of April 25, 1986 . . . . It's good to be back on the union team again . . . . Chris, I would like to take this time to apologize for having that non-union man on the job, however, you must understand I thought I was a non-union contractor. Since I didn't hear anything from you after I had answered your questions, nor did you make an effort to sit down and negotiate with me at any time, that my contact offer of 4/25/86, was unacceptable to you . . . .

On March 31, 1987, the Cement Masons' Contract Administration Fund wrote the Employer advising it that the Bell grievance had been resolved against it and that it was required to pay 15 days' wages and fringe benefits to the top man on the out-of-work list. On March 25, 1987, the Respondent District Council filed a similar grievance against the Employer and another employer, Granite Construction. This grievance resolution was transmitted on October 23, 1987, to Granite Construction, which is described as the Employer's general contractor. The resolution required Granite to pay 2-1/2 days' wages and fringe benefits to the top man on the out-of-work list ''in the event Marina Concrete fails to comply with the order of the panel in Case no. 37–0015(B).''[4]

The Employer subsequently filed an action in Federal District Court seeking to have the arbitration award in the Bell case vacated. The court stayed the case pending resolution by this Board. Respondents counterclaimed, seeking to have the award judicially enforced. This latter effort is among the matters alleged to violate Section 8(b)(1)(A) and (2) of the Act.

Analysis

The judge found, and we agree, that the Employer successfully withdrew authority from its bargaining representative to bargain on its behalf. As noted by the judge, *Retail Associates*, 120 NLRB 388 (1958), requires that written notice of withdrawal be both timely and unequivocal.[5] In order to be timely, the written notice must be given before the date set by the contract for modification, or to the agreed-upon date to begin

[4] The dissent notes that both arbitration panels found that the Employer was bound by the collective-bargaining agreement. In view of the fact that the Employer, consistent with its previously stated position that it was not a party to any agreement, failed to appear before either panel, this ''fact'' is neither unusual nor persuasive.

[5] As discussed below, the Employer had merely an 8(f) collective-bargaining relationship with the Respondents. We accept arguendo that all of the *Retail Associates* rules apply here to the extent that parties to that relationship did not agree otherwise.

the multiemployer negotiations, unless mutual consent is given. In order to be unequivocal, the written notice must contemplate ''a sincere abandonment, with relative permanency, of the multi-employer unit'' and an intent to deal with the union on an individual basis.

We agree with the judge's finding that the Employer's letters to the AGC and the Respondent District Council all constituted timely and unequivocal written notice of withdrawal. We agree with the judge's finding that the informal discussions between the AGC and the Respondent District Council did not constitute ''negotiations,'' because the Respondent District Council expressly agreed to the contrary in a signed memorandum. Thus, as found by the judge, as late as April 25, no negotiations towards a new agreement had commenced.[6] Also, as required by the 1983–1986 contract, the April 1 letters were sent more than 60 days prior to the June 15, 1986 expiration date, and thus were timely.

The letters also clearly state that the Employer would not be bound by ''any agreement'' between the AGC and the Respondents but would negotiate on an individual employer basis. We agree with the judge's conclusion that the Employer effectively repudiated its collective-bargaining relationship with the Respondents at a time when no negotiations to replace the then-current agreement had yet begun.[7]

Notwithstanding the foregoing facts our dissenting colleague contends that the Respondents had a ''colorable,'' ''reasonable,'' and ''good faith'' belief[8] that the Employer was bound to the terms of the collective-bargaining agreement. In support, our colleague contends this belief was reasonable because, inter alia, the Employer continued to pay union wages and benefits, continued to make contributions to certain employee benefit funds, and availed itself of the union hiring hall after the prior agreement had expired. We disagree.

The Employer manifested every intention not to be bound by either the old or new agreement. It sent the proper parties the required timely written notification, and then sent additional written confirmation. It did not execute the 1986–1989 collective-bargaining agreement. It never entered into any independent union-security agreement or agreed to extend by contract any of the terms and conditions of the 1983–1986 agreement. While the Employer did maintain certain terms and conditions of the expired agreement, its actions were consistent with Board law prior to February 1987. Although *John Deklewa & Sons*[9] was decided several months before the filing of charges in this case and is applicable, pre-*Deklewa* law explains the Employer's maintenance of terms and conditions of employment past the expiration date and pending negotiations. As Employer-Owner Michael Youngblood testified, up until late in 1986, he believed the Union was going to negotiate with him and thus he felt he should continue the former agreement's terms and conditions and not ''upset the cart.''[10] Nor, in any event, does it follow that if an employer is privileged to act unilaterally that it must do so in order to preserve its rights.

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[6] Our dissenting colleague contends that, given the content of the discussions, they should be deemed negotiations for purposes of applying the *Retail Associates* doctrine and binding the Employer before the March 15 date. This overlooks the parties' apparent intent in the July 1985 memorandum to remove their dealings from the constraints of *Retail Associates*, something which they were surely free to do, just as parties are free to place constraints on their bargaining relationship which the statute does not itself impose. See *Speedrack, Inc.*, 293 NLRB 1054, 1055 (1989) (parties free to restrict their rights to use economic weapons or implement final proposals upon impasse). There is no evidence that the parties ever rescinded the agreement that their discussions would not be deemed negotiations. It was consistent with such an understanding that AGC members were allowed until March 15 to opt out of the tentative collective-bargaining agreement and that the Respondent, as explained in fn. 6 below, raised no objection to the list of signatory employers for the 1986–1989 agreement omitting the Employer's name.

[7] We find that the Respondents were properly notified and were aware that the Employer had withdrawn its authorization from the AGC and that they acknowledged that fact on April 18, when Holsman of the AGC, the Employer's then bargaining representative, gave Hernandez of Respondent District Council, Respondent Local's bargaining representative, a list of the contractors the AGC represented for bargaining on the new contract. The Employer's name was clearly not on the list and Hernandez confirmed to Holsman that there was ''no problem'' with the list.

[8] It is this contention that is the crux of our disagreement with the dissent. Thus, the dissent's concern that our decision is inconsistent with the Board's long-standing policy of prearbitral deferral, as stated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), simply begs the question. *Collyer* applies only when both parties are mutually bound to an arbitral mechanism. As we have found here, the Employer is *not* bound, and the Respondent had no reasonable basis for believing that it was.

The dissent's reliance on *Collier Electric Co.*, 296 NLRB 1095 (1989), is equally misplaced. There the Board specified as the initial step in its analysis a determination ''whether there is a reasonable basis in fact or law for the union's submission of unresolved issues to interest arbitration.'' Id. at 1098. Because *Collier Electric* is therefore distinguishable, Chairman Stephens, who dissented in that case, finds it unnecessary to consider here whether he would overrule it.

In *Neyens Refrigeration Co.*, 311 NLRB 1140 (1993), Member Raudabaugh, dissenting, expressed his view that *Collier Electric* was wrongly decided. If that dissenting view were applied to the instant case, Member Raudabaugh would base the violation on the premise that the Union's grievance was for an unlawful objective, within the meaning of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 737 fn. 5 (1986). However, Member Raudabaugh recognizes that *Collier Electric* remains Board law. Accordingly, for institutional reasons, he accepts *Collier Electric* as Board law, but like Chairman Stephens, he distinguishes that case on the basis that the Respondent's grievance herein did not have a reasonable basis.

[9] 282 NLRB 1375 (1987).

[10] Our dissenting colleague argues that we rely on testimony of the Employer's owner Youngblood that was not credited by the judge. Youngblood's testimony was not rejected by the judge and is uncontroverted, as the Respondents presented no witnesses at the hearing. Indeed, in their brief to the Board the Respondents asserted that Youngblood ''admitted'' that ''it was in his interest to continue . . . under the terms of the agreement . . . .''

See *United Technologies Corp.*, 287 NLRB 198, 198–199 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989) (fact that party forgoes exercise of contractual right does not prove the nonexistence of that right).

There is no dispute here that the Employer's agreement with the Respondents was an 8(f) agreement. Under *Deklewa*, upon the expiration of an 8(f) agreement ''the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.'' Under *Deklewa*, an employer's compliance with the terms of the agreement after the expiration date is purely voluntary and gives rise to no obligations whatsoever. Here, the Employer's failure to change some terms and conditions of the 1983–1986 agreement subsequent to June 15, 1986, was simply voluntary and raises no viable argument of adoption-by-conduct as the dissent seems to suggest.[11]

The dissent also contends that the new agreement was ratified by the Respondent Local and the AGC in February 1986, and that the Respondent Local never agreed to allow employers to withdraw from the agreement through March 15, 1986. It is unclear whether the AGC approved the contract in February and may not have actually done so until at least March 15. In any event, the Respondent District Council, on behalf of the Respondent Local, agreed prior to ratification that employers could withdraw up until March 15, a date well after the alleged ratification. The Respondent Local's attempt to disavow its bargaining representative's conduct is disingenuous.

In sum, we do not agree with our colleague's premise that the Respondents had a ''colorable,'' ''reasonable,'' or ''good faith'' belief that the Employer was bound by the agreement.[12] Notwithstanding the absence of such a belief, the Respondents have filed grievances, secured an award, and sought to enforce that award in court. The aim of these proceedings was to force the Employer into a bargaining relationship which it had lawfully abandoned and to coerce employees to be represented by the Respondents and to be bound to a union-security clause of an expired contract. The Respondents thereby acted not only without reasonable basis but also in derogation of statutory rights. Such conduct violates Section 8(b)(1)(A) and (2) of the Act. See *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140, 144 (1991) (finding violation of Sec. 8(b)(1)(B) against union which, without reasonable basis, sought court enforcement of interest arbitration award, in derogation of the employer's right under *Deklewa* to terminate the collective-bargaining relationship).

[11] The Employer continued to operate under the expired contract terms for several months on one project which had been bid under the prior contract and one which had been started before expiration of the contract. This short-term compliance with the expired contract does not bind the Employer to a new agreement. See *Garman Construction Co.*, 287 NLRB 88 fn. 5 (1978). (Adoption-by-conduct doctrine is inapplicable in 8(f) cases.)

[12] We do not find our dissenting colleague's reliance on *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939 (1987); *Sheet Metal Workers Local 206 (West Coast Sheet Metal)*, 298 NLRB 760 (1990), affd. 938 F.2d 1356 (D.C. Cir. 1991); and *Teamsters Local 988 (Emery Worldwide)*, 303 NLRB 306 (1991), revd. sub nom. *Emery Worldwide v. NLRB*, 966 F.2d 1003 (5th Cir. 1992), to be persuasive. All three cases are premised on a finding that the unions' beliefs were ''reasonable.'' As we have stated, we find the Respondents' asserted belief that the Employer here was bound to the agreement was ''not reasonable.'' Chairman Stephens thus finds it unnecessary to express an opinion in this case on whether *Warwick Caterers* and *Emery Worldwide* were correctly decided.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondents, District Council of Plasterers and Cement Masons of Northern California, and Cement Masons Local 337, both affiliated with Operative Plasterers and Cement Masons International Association, their officers, agents, and representatives, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 1.

''1. Cease and desist from

''(a) Restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act by initiating and/or procesecuting grievances against Marina Concrete Company, or any other employer, in an effort to enforce the union-security provisions of an expired collective-bargaining agreement, or in any instance where an employer has effectively repudiated its collective-bargaining relationship with the Union.

''(b) Causing or attempting to cause any employer to discriminate against any employee in violation of Section 8(a)(3) of the Act, by requesting that the employee be discharged by any employer, including Marina Concrete Company, because it employs persons not members of the Union.

''(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER DEVANEY, dissenting.

On September 26, 1986, the Respondent Cement Masons Local 337 (Local) filed a grievance against the Employer to enforce the union-security provisions of its collective-bargaining agreement with the Associated General Contractors (AGC). On March 25, 1987, the Respondent Plasterers and Cement Masons of Northern California (District Council) filed a similar grievance. Contrary to my colleagues, I would find that the Respondents (Union and District Council) did not violate Section 8(b)(1)(A) or (2) of the Act by filing and maintaining these grievances, or by seeking to have an

arbitration award in their favor judicially enforced, where the Respondents had a colorable belief that the Employer was bound to the terms of the agreement and the matter had not been previously determined through an adjudicatory process.

My colleagues find that the Respondents' actions were unlawful because the Employer in fact was not bound by any agreement with the Respondents and there was thus no valid union-security clause in force. However, the Board has emphasized that a lawsuit or grievance arbitration ''must have been instituted for an unlawful objective before a violation of our Act can be found.'' *Electrical Workers Local 532 (Brink Construction Co.)*, 291 NLRB 437, 438 (1988). Where there is a reasonable basis for the unions' contentions, the Board has found that its objectives in obtaining an adjudication were not unlawful. Id.; see also *Teamsters Local 483 (Ida Cal Freight)*, 289 NLRB 924 (1988) (union ''had a legitimate interest in seeking a resolution of the issue through grievance arbitration and through a Section 301 lawsuit.'').[1]

Even if the union's contentions are ultimately rejected, the fact that the union pursued those contentions through arbitration does not establish that their actions had an unlawful objective. See, e.g. *Brink Construction Co.*, above (''Local 532's lawsuit has thus been proven to be without merit, but that does not mean that the suit was ipso facto an unfair labor practice.''); *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939 (1987) (union's efforts through grievance arbitration to apply an agreement containing a union-security clause to a group of employees outside the unit which it represented found reasonable even though the Board ultimately found that the agreement did not cover those employees).[2]

I believe that the Respondents had a reasonable, good-faith basis for asserting that the Employer was bound by the 1986–1989 agreement—including that agreement's union-security obligations. The Respondents produced the following evidence in support of their contention that the Employer was bound by their 1986–1989 agreement with the Associated General Contractors: (1) evidence that the 1986–1989 agreement was ratified by the Union and AGC on February 11, 1986, well before the Employers' March 13, 1986 letter to AGC withdrawing from the multiemployer association or its April letters notifying the Union that it would bargain as a single employer; (2) evidence that the Respondents did not agree to allow employers to withdraw from the multiemployer association through March 15, 1986, which was the date on which the 1986–1989 agreement became effective; (3) an admission by the Employer that it had offered to replace a nonunion employee with a union member after the prior agreement had expired; (4) evidence that the Employer continued to abide by some of the provisions of the 1986–1989 agreement after the date the prior agreement had expired, including the hiring hall, wage, and fringe benefit clauses and made contributions to certain multiemployer benefit funds on its employees' behalf; (5) evidence that, even after the 1983–1986 agreement had expired, the Employer acknowledged the Union as its employees' representative in requests for hiring hall referrals and represented to the multiemployer trust funds that the contributions on its employees' behalf were pursuant to the 1986–1989 agreement; and (6) evidence that the arbitration panels to which the two grievances were referred found that the Employer was bound to the 1986–1989 agreement.[3]

My colleagues contend that the Employer's continued contributions to multiemployer benefit funds and continued use of a hiring hall do not support the Respondent's belief that the Employer was bound to the 1986–1989 contract. This contention overlooks important facts. First, the Employer's president testified that, in response to the Union's request in September 1986, he offered to replace a nonunion employee with a union member referred by the hiring hall if the Union could send him someone qualified to do the work. In the absence of a *current* contract containing union-security provisions, the Employer would have violated Section 8(a)(3) of the Act had it carried out this promise. *Trico Products Corp.*, 238 NLRB 1306 (1978) (finding no violation because contract extended). Surely, then, the Employer's stated willingness to replace the employee gave the Union reasonable grounds to

[1] A violation may be found when a party resorts to the grievance/arbitration machinery in retaliation for the exercise of protected activities. Cf. *Pueblo International*, 229 NLRB 770 (1977) (union only sought discharge of employee for nonpayment of dues after he made remarks critical of union's leadership). There is no claim or evidence that the Respondents here filed or maintained these grievances for the purpose of retaliating against the exercise of Sec. 7 rights.

[2] The Board has also found lawful a union's resort to arbitration to resolve contentions that an employer remained bound by an agreement because it was automatically renewed, *Brink Construction*, above, to a claim that historically separate units had been merged, *Teamsters Local 988 (Emery Worldwide)*, 303 NLRB 306 (1991) revd. sub nom. *Emery Worldwide v. NLRB*, 966 F.2d 1003 (5th Cir. 1992) (disagreeing with the Board's finding that union's claim that historically separate units had been merged was reasonable on facts of case), and to claims that an employer was bound by the interest arbitration provisions of an expired collective-bargaining agreement. *Sheet Metal Workers Local 206 (West Coast Sheet Metal)*, 298 NLRB 760 (1990), affd. 938 F.2d 1356 (D.C. Cir. 1991); *Electrical Workers Local 113 (Collier Electric Co.)*, 296 NLRB 1095 (1989).

[3] My colleagues contend that this fact is not persuasive because the Employer chose not to appear at the hearings to present evidence in its defense. I would not allow the Employer to bootstrap its avoidance of the arbitral forum into evidence that its position has merit. Moreover, the record shows that the panel did not automatically decide grievances against a defaulting party, and there is no evidence that the AGC representative on the panel was not aware of the facts underlying the Employer's defense, i.e., its efforts to withdraw bargaining authorization from AGC.

believe that the Employer was bound by the 1986–1989 agreement.

Likewise, the Employer did more than merely continue to submit contributions to a multiemployer benefit fund after the 1983–1986 agreement had expired; it also signed statements with each contribution acknowledging that it was bound by the 1986–1989 agreement. I would find that the Respondents were entitled to take the Employer at its word.[4]

My colleagues apparently find that the Employer has established its timely withdrawal of bargaining authorization from the AGC with sufficient clarity to preclude any subsequent claim by the Respondents that they reasonably believed the Employer was bound to the 1986–1989 agreement. In this regard, my colleagues agree that the parties began discussions concerning a new contract in July 1985, and that the discussions ended in January 1986 with a tentative agreement. Under well-established law, any effort by the Employer to withdraw from the multiemployer unit after negotiations began would be ineffective absent mutual consent. *Retail Associates*, 120 NLRB 388 (1958).

However, the District Council and the AGC agreed in July 1985, that ''exploratory discussions preceding the formal opening of collective bargaining negotiations'' would not be considered ''collective bargaining negotiations as set forth in Section 19 of the 1983–1986 AGC Cement Masons Agreement.'' In order to find the Employer's withdrawal timely, my colleagues have concluded, without citation to any authority, that all of the discussions preceding the 1986–1989 contract were ''exploratory discussions'' within the meaning of this agreement, and that this characterization of the discussions determines the parties' rights under *Retail Associates* as well as their rights under Section 19 of the 1983–1986 agreement.[5] Even if my colleagues are correct, these propositions are hardly self-evident and I would find that the Respondents were entitled to test them in grievance arbitration.[6]

My colleagues also find that the parties agreed that, even after the tentative contract was circulated for signing, employers could withdraw bargaining authorization from the AGC until March 15, 1989. However, the only evidence of this ''agreement'' is Holsman's testimony: it does not appear in the minutes he took during meetings with the District Council or in the written ground rules signed by the parties. Although the judge credited Holsman's testimony, I would find that it was not unreasonable for the Respondents to test, in grievance arbitration, a matter which was resolved on credibility grounds.[7] Compare *West Coast Sheet Metal*, above (union's claim that employer bound by interest-arbitration clause after withdrawal from multiemployer bargaining and contract expiration found reasonable even though union had conceded that clause had been eliminated from the agreement).

The Respondents' claims satisfy the reasonableness standard which the Board has applied in prior cases. Thus, in *Emery Worldwide*, above, the Board found that the union had a reasonable basis for its claim that its contract covered a historically separate unit of former Purolator employees (Emery acquired Purolator in 1987), even though the contract clause at issue excluded from coverage employees already represented under a separate agreement. See also *West Coast Sheet Metal*, above; *Ida Cal Freight Lines*, above (claim that owner-operators were employees was reasonable because lease agreements were recent developments and resolution of this issue turns on the facts of each case); *Warwick Caterers*, above (accretion claim reasonable even though employees had separate supervision, limited interchange, and daily operations of the two entities were separate and autonomous). I see no reason to hold the Respondents to a higher standard in this case.

Because the Respondents' contentions were reasonable, finding a violation in this case is also inconsistent with the Supreme Court's teachings in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). In that case, the Supreme Court held, inter alia, that the Board could enjoin state court suits to the extent that the suit was filed in retaliation for engaging in protected activities and had no reasonable basis in fact or law. As previously discussed, the Union here had a reasonable

[4] My colleagues suggest that the Employer's continued compliance with the terms of the expired agreement is due to a desire not to ''upset the cart'' as it continued to believe that the Union would negotiate with it on an individual basis. This testimony was not credited by the judge and is flatly contradicted by the Employer's April 1986 letter advising the Local Union that if it did not wish to ''comply'' with the Employer's proposed ''terms and demands as they are stated here, then on June 15, 1986, this company will no longer be bound in any way with your Union.'' Moreover, I note that the Employer never communicated this post hoc rationale for its actions to the Respondents. In my view, it is the Employer's efforts to disavow its various representations in this case, rather than any conduct or statement by the Respondents, which is ''disingenuous.''

[5] AGC Representative Holsman testified that wages, benefits, and overtime pay were discussed at the meetings between July 1985 and January 1986. Thus, absent the July 1985 agreement on ground rules, it is clear that these meetings constituted negotiations for a new agreement under *Retail Associates*.

[6] Thus, my colleagues' efforts to establish that the Respondent's position was incorrect do not answer the ultimate question presented by this case: whether the Respondent's position was reasonable. In light of the facts mentioned above, the Respondents' failure to object to the list of signatory employers presented to it on April 18, 1986, and omitting the Employer's name, does not establish the unreasonableness of the Respondents' position.

[7] I further note that a concession of this magnitude by the Respondents, effectively waiving their right to object to withdrawals from the multiemployer unit prior to March 15, 1986, is one which I would expect to be reduced to writing, and that the burden of proof on this issue rested with the General Counsel.

basis for the contentions it submitted to the arbitration panels.

As my colleagues note, the Supreme Court observed in *Bill Johnson's* that the Board may enjoin a state court suit ''that has an objective that is illegal under federal law.'' Id. at 737 fn. 5. However, it is clear from the context of the cited passage that the Court was referring only to suits whose prosecution is unlawful on their face (that is, suits which are unlawful even if the plaintiff's factual assertions are accepted as true). Thus, the two examples of suits with an ''illegal objective'' cited by the Court involved suits by unions to enforce fines, for postresignation conduct, against employees who had effectively resigned their membership in the union. The Board has held with court approval that the imposition of fines under these circumstances, and thus any effort to collect the fines in court, is unlawful on its face.[8]

In this case, in contrast, the Union's actions are claimed to be unlawful only because the Board has rejected its contention that the Employer was bound to the 1986–1989 agreement. As the Board carefully noted in *Elevator Constructors Local 3 (Long Elevator)*, 289 NLRB 1095 (1988), ''Because we have concluded that the contract clause *as construed by the Respondent* would violate Section 8(e), we may properly find the presentation of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johonson's Restaurants v. NLRB* . . . .'' (Emphasis added.) Here, the Union's actions are clearly lawful if we adopt its construction of the facts. Thus, there is no basis under either *Bill Johnson's* or our cases for finding that the Union had an unlawful objective in seeking an adjudication of its rights through the grievance arbitration machinery to which the parties agreed.[9]

In my view, finding a violation in this case is also inconsistent with the Board's well-established policy of giving ''hospitable acceptance to the arbitral process.'' *Collyer Insulated Wire*, 192 NLRB 837, 841 (1971). See also *Collier Electric Co.*, 296 NLRB 1095, 1099 (1989) (''Allowing parties to seek resolution of disputes under the provisions of their collective-bargaining agreements furthers the policy of collective bargaining under the Act.'').[10]

Because Board cases establish that the Union acted lawfully in seeking an adjudication of its claims, I would dismiss the complaint.

[8] *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636 (1971), enf. denied 446 F.2d 369 (1st Cir. 1971), revd. 409 U.S. 213 (1972); *Machinists Lodge 405*, 185 NLRB 380 (1970), enfd. in relevant part 459 F.2d 1143 (D.C. Cir. 1972), affd. 412 U.S. 84 (1973).

[9] See also *Teamsters Local 705 v. NLRB*, 820 F.2d 448 (D.C. Cir.), affd. after remand 835 F.2d 367 (D.C. Cir. 1987) (filing grievance to enforce alleged union standards subcontracting agreement ''would seem illegal only if the agreement itself was secondary'' and thus per se unlawful); *Laundry Workers Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985) (suit to collect fine for postresignation conduct unlawful because fines ''could not lawfully be imposed under the Act.'').

[10] I note that the Board's *Collier Electric* policy of staying its hand when one of the parties seeks a judicial determination of their obligations under an interest arbitration clause has been approved by the District of Columbia Circuit in *West Coast Sheet Metal v. NLRB*, above.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act by initiating and/or prosecuting grievances against Marina Concrete Company, or any other employer, in an effort to enforce the union-security provisions of an expired collective-bargaining agreement, or in any instance where an employer has effectively repudiated its collective-bargaining relationship with us.

WE WILL NOT cause or attempt to cause any employer to discriminate against any employee in violation of Section 8(a)(3) of the Act, by requesting that the employee be discharged by any employer, including Marina Concrete Company, because it employs persons not members of the Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL cancel all outstanding grievances against Marina Concrete Company and/or Granite Construction Company and we will immediately notify employees Ron Bell and James Dennis Rogers that the disciplinary proceedings against their employers are null, void, and of no force or effect, and that our internal union files and records will be purged of any references to such proceedings after obtaining permission and authorization to do so from the Regional Director for Region 32 of the Board; and, after obtaining such permission and authorization:

WE WILL permanently expunge from our files and records all references to such grievance proceedings.

WE WILL return any fines, with interest, to Marina Concrete Company and/or Granite Construction Company, which may have been collected from either of them pursuant to any such grievance proceedings.

WE WILL notify in writing Marina Concrete Company that we have no objection to Ron Bell and/or James Dennis Rogers working for it.

DISTRICT COUNCIL OF PLASTERERS AND CEMENT MASONS OF NORTHERN CALIFORNIA, AND CEMENT MASONS LOCAL 337, BOTH AFFILIATED WITH OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION

Ann Leslie Unger, Esq., for the General Counsel.
Paul Supton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Respondent.
Roger M. Mason, Esq. (Thierman, Cook, Brown and Mason), of San Jose, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Oakland, California, on July 26, 1988, and is based on a charge, subsequently amended, filed by Marina Concrete Company (the Employer) on July 1, 1987, alleging generally that Plasterers and Cement Masons of Northern California (the Respondent District Counsel), and Cement Masons Local 337 (the Respondent Local), both affiliated with Operative Plasterers and Cement Masons International Association, committed certain violations of Section 8(b)(1)(A)[1] of the National Labor Relations Act (29 U.S.C. § 151 et seq., the Act). On March 29, 1988, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, also subsequently amended, alleging violations of Section 8(b)(1)(A)[2] and (2)[3] of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.[4]

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Employer and counsel for Respondents, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that the Employer is a sole proprietorship, with an office and place of business in Salinas, California, where at all times material, it has been engaged in the construction industry as a supplier of concrete to other contractors; that during the 12-month period preceding the issuance of the complaint herein, in the course and conduct of its business operations, it provided services valued in excess of $50,000 directly to customers or business enterprises which themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards.

At the trial, Respondent stipulated that Respondent has provided services valued in excess of $50,000 annually to another construction industry employer engaged in the construction of facilities used in the national defense. This stipulation was augmented during the trial by the credible testimony of the Employer's owner, to the effect that he performed work for the construction of national defense facilities beginning in late 1985, that he was paid monthly by the general contractor, beginning in January 1986, and that the total sum of over $500,000 was paid him for this work by the end of October 1986.

Accordingly, I find and conclude that the Employer is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that Respondent District Counsel and Respondent Local are now, and at all times material have been, labor organizations within the meaning of Section 2(5) of the Act.[5]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Background and Labor Relations History*

The Charging Party is a subcontractor in the business of providing concrete to construction industry employers in the Salinas, California area. It is owned and operated by one Michael Youngblood.

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[1] Later amended to include Sec. 8(b)(2), as well.

[2] Sec. 8(b)(1)(A) provides that,

> It shall be an unfair labor practice for a labor organization or its agents
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

[3] Sec. 8(b)(2) provides that,

> It shall be an unfair labor practice for a labor organization or its agents
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

[4] Respondent also asserted, by way of affirmative defense, (1) that the Act is unconstitutional, denying Respondent rights which it is entitled to under the first amendment, and (2) that the Board's jurisdiction is insufficient to enable it to grant the remedy sought. Neither affirmative defense is further argued or factually supported by Respondent. Each is, accordingly, dismissed.

[5] The answer fails to admit that Respondent Local is, or has been, ''a constituent member'' of Respondent District Counsel. While there was no direct evidence of the truth of this allegation, I regard it as sufficiently proven by the wording of documents in evidence, such as collective-bargaining agreements negotiated by Respondent District Council on behalf of various local unions, including Respondent Local.

While the Employer began it operations as a nonunion contractor, it had a collective-bargaining relationship from 1971 until 1986 with Respondent Local. As testified to by Youngblood, around the end of 1972 it signed a contract with a multiemployer association known as the Associated General Contractors (the AGC), thereby becoming bound by the AGC's collective-bargaining agreement with Respondent Local, negotiated for Respondent Local by Respondent District Council. Finally, in January 1986, it became a member of the AGC.

In September 1983 the Employer signed the April 1984–June 15, 1986 collective-bargaining agreement between Respondent Local and the AGC, which provided that it continued from year-to-year unless written cancellation was given 60 days prior to June 15, 1986.

B. *The Preliminary Talks*

In July 1985 the Respondent District Council and the AGC entered into talks. The parties executed a memorandum which characterized the talks as ''exploratory discussions preceding the formal opening of collective bargaining negotiations,'' as ''off the record,'' as nonbinding absent approval and ratification by the Union and the AGC, and went on to recite that:

> 5. The parties agree that the discussions described above shall not constitute collective bargaining negotiations as set forth in Section 19 of the 1983–1986 AGC Cement Masons Agreement.

The AGC advised its members that, if they did not wish to be bound by the new agreement, they had to withdraw bargaining authorization by March 15, 1986. It also advised members that they must continue to abide by the terms of the 1983–1986 agreement until its expiration, and that thereafter they were obliged to bargain with the Union individually. The date of March 15, 1986, had been agreed upon, according to the credible testimony of a representative of the AGC, Executive Director Thomas T. Holsman, in discussions between representatives of AGC and the District Council.

The informal, exploratory discussions concluded in the last week of January 1986. The parties had by that time reached a tentative agreement as to all the terms of a new collective-argaining agreement. The AGC thereafter notified its members that those among them who did not wish to become bound by the terms of the new agreement had until March 15, 1986, to withdraw authorization from the AGC to bargain collectively on their behalf.

C. *The Employer's Actions to Withdraw Authorization From the AGC*

The Employer sent a telegram dated March 13, 1986, which was delivered March 14, 1986, advising the AGC that it would not be a party to any agreement entered into between the AGC and the District Council. By letter, dated March 19, 1986, the AGC advised the District Council that the Employer would no longer be represented by the AGC.

On April 1, 1986, the Employer wrote to the AGC that it was withdrawing bargaining authorization from it, that it would not be bound by any new agreement between the AGC and ''Laborers/Tunnel Laborers Union,'' and that it recognized that it was bound to comply with the terms and conditions of the then current agreement until its June 15, 1986 expiration date.[6]

On April 1, 1986, the Employer confirmed to the District Council that it had revoked the AGC's authority to negotiate on its behalf, and that it would not be bound by any new agreement or extension or amendment to the old agreement, ''or any other labor agreements with your organization.'' At the same time, the Employer advised that it would be willing to meet as an individual employer. On the same day, the Employer sent a near identical letter to the Respondent Local.

On April 18, 1986, the AGC provided the District Council with a list of the contractors represented by it in bargaining toward a new agreement to replace the 1983–1986 agreement. The Employer's name was not on the list. Shortly thereafter, Holsman called the representative of the District Council, Chris Hernandez, the Chairman of the District Council's Negotiating Committee (according to the wording on the new agreement of June 1986), and was told that the District Council had no problem with the list he had been provided, which, as noted earlier, did not include the Employer.

D. *Subsequent Dealings Between the Employer and Respondents*

On April 10, 1986, Respondent District Council wrote to the Employer and, acknowledging the letter it had received of April 1, asked the Employer to provide it with certain information.

By letter of April 25, 1986, the Employer provided certain of the information requested, most notably the identity of the person who would be spokesperson for the Employer ''during these negotiations.'' The Employer closed its letter by stating, ''If you do not wish to comply with these terms and demands as they are stated here, then on June 15, 1986, this company will no longer be bound in anyway with your Union.''

No negotiations have occurred between the Employer and Respondents since the letter of April 25, 1986, and their contacts appear to have been limited to the events described below. Meanwhile, as noted above, on June 15, 1986, the old agreement expired, and the Employer has not complied with many of the terms of its replacement.

E. *Respondents' Attempts to Enforce the New Agreement Against the Employer*

On May 22, 1986, the Respondent District Council's attorneys wrote back that, ''if you do not submit the requested information we will file appropriate legal action and sue.''

On September 23, 1986, Respondent Local wrote to the Employer, requesting that it ''comply with the provisions of Section 3(A)(2) of the Cement Masons 46 Northern California Counties Master Agreement by discharging the individual named below for failure to comply with the provisions of Section 3(A)(1) of said Agreement in that said individual has failed to remain and/or maintain membership in good stand-

[6] The record is unclear as to the interest of the Union referred to in this letter, but I regard the revocation of authority to negotiate as unequivocal, no matter what the identity of the union. In any event, the new agreement of June 1986 was negotiated by the Respondent District Council, and, by its terms, was done on behalf of the Respondent Local, among other unions.

ing with the Union.'' The individual named was one Ron Ball. The agreement referred to is the new agreement of June 1986, previously mentioned. The sections referred to are the ''union security'' and ''hiring hall'' clauses of the new agreement.

On September 26, 1986, Respondent Local's business agent and business manager signed a grievance against the Employer on account of the Employer's failure to discharge Ron Hall, as requested. The grievance stated that it sought, as a remedy, ''compliance with the agreement in the future, backpay . . . and reimbursement to the union of lost dues and initiation fees.'' A copy of the grievance was sent to the Employer by Respondent Local on October 2, 1986.

On December 23, 1986, the Respondent Local did as it had promised in its letter, just mentioned, and took the matter before the ''Contract Administration Board of Adjustment,'' for resolution.

The Employer did not appear. Instead, on December 12, 1986, it wrote to Chris Hernandez of the District Council, and made sarcastic reference to its letter of April 25, 1986, referred to above, saying,

> I'm so glad you have accepted my contract offer of April 25, 1986. . . . It's good to be back on the union team again. . . . Chris, I would like to take this time to apologize for having that non-union man on the job, however, you must understand I thought I was a non-union contractor. Since I didn't hear anything from you after I had answered your questions, nor did you make an effort to sit down and negotiate with me at any time, that my contract offer of 4/25/86, was unacceptable to you.

On March 31, 1987, the Cement Mason's Contract Administration Trust Fund wrote the Employer, enclosing a copy of the minutes of the meeting in which the grievance had been resolved against the Employer. Those minutes directed the Employer to pay 15 days wages and fringes to the top man on the out-of-work list.

By letter of March 25, 1987, the Respondent District Council filed a grievance against the Employer. This grievance was based on the Employer's, and another employer named Granite Construction, alleged failure to comply with the same provisions of the new agreement as were mentioned in the previous grievance, this occasion involving an employee named James Dennis Rogers.

By letter of October 23, 1987, to Granite Construction, which is described as the Employer's general contractor, a copy of the grievance's resolution was transmitted. The resolution required Granite to pay 2-1/2 days wages and fringes to the top man on the out-of-work list ''in the event Marina Concrete fails to comly with the order of the panel in Case No. 37–0015(B).''

The Employer subsequently filed an action seeking to have the arbitration award in the case involving employee Ron Bell vacated. The action is presently pending in Federal District Court, where it has been stayed while waiting the resolution of the Board. Respondents have, in the meantime, counter-claimed, seeking to have the award judicially enforced. This latter effort is among the items claimed to be in violation of Section 8(b)(1)(A) and (2) of the Act.

F. *The Issues Presented*

(1) Whether the Employer successfully repudiated its collective-bargaining relationship with Respondents, so as to effectively withdraw recognition of the Respondents following the expiration of the old agreement.

(2) Whether the Respondents violated Section 8(b)(1)(A) and (2) of the Act by filing grievances against the Employer on September 23, 1986, and March 25, 1987, in an attempt to enforce the union-security provisions of either the old or the new agreements between the Respondents and the AGC.

(3) Whether this charge and complaint are barred by Section 10(b) of the Act.

G. *Analysis and Conclusions*

I conclude that the Employer has met the test set forth by the Board to determine whether or not an employer may successfully withdraw the authority to bargain collectively on its behalf from a multiemployer bargaining association such at the AGC. That test is set forth in *Retail Associates*, 120 NLRB 388 (1958), and requires that written notice of withdrawal be given which is both timely and unequivocal. In order to be deemed unequivocal, the written notice must contemplate ''a sincere abandonment, with relative permanency, of the multi-employer unit'' and an intent to engage the union on an individual-employer basis. In order to be deemed timely, the written notice must be given before the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations, unless mutual consent is given.

Here, each of the conditions is met.

The requirement of a ''written notice'' is satisfied by the Employer's letters of April 1, 1986, to both the AGC and Respondent District Council (which was Respondent Local's negotiating agent), as well as by the Employer's letter to Respondent District Council of April 25, 1986.

The requirement of timeliness is met because the letters of April 1 and April 25, to the Respondent District Council, were each sent prior to the beginning of negotiations to replace the then current collective-bargaining agreement. No argument can be made that the informal discussions constituted ''negotiations,'' because the Respondent District Council had expressly agreed to the contrary, according to both the credited testimony of Holsman and the memorandum agreement signed at the outset of those preliminary discussions. Obviously, those discussions would constitute ''negotiations'' absent any agreement to the contrary, but an agreement such as was entered into here should not be lightly construed as a fiction. There are important policy considerations favoring construing such discussions as the parties themselves wish, such as the facilitation of replacing agreements about to expire without the parties fearing to talk to one another lest they forfeit rights of their respective constituencies by beginning too early. Accordingly, I find and conclude that, by the date of either of the Employer's letters to Respondent District Council, no negotiations toward replacing the expiring agreement had yet commenced between the AGC and Respondents.

The requirement that there be no equivocation is met because nothing could be clearer than the words of the Employer, in its letters of April 1 and April 25, 1986, it stated that it would not be bound by any agreement reached by the

AGC and Respondents, and then went on to offer to negotiate on an individual basis.

Accordingly, I find and conclude that the Employer effectively repudiated its collective-bargaining relationship with Respondents at a time when no negotiations aimed at replacing the then current agreement had yet commenced, that is, by April 25, 1986.

Such a result necessarily would privilege the Employer's withdrawal of recognition from Respondents following the expiration of the then current agreement on June 15, 1986. This is so because there is no showing that Respondents ever achieved majority status among a unit of the Employer's employees. Instead, it seems clear that the recognition given Respondents by the Employer was based on the provision made for employers in the construction industry by Section 8(f) of the Act. Under the holding of *John Deklawa & Sons*, 282 NLRB 1375 (1987), employers may lawfully repudiate 8(f) bargaining relationships after the contract which forms the basis of that relationship has expired. I find and conclude that the Employer has done so lawfully here.[7]

It follows from the above that the Respondents separate attempts, in filing and prosecuting grievances which resulted in what amounts to fines of the Employer, are violative of Section 8(b)(1)(A) and (2) of the Act, because they represent clear attempts to enforce the union-security provisions of an expired collective-bargaining agreement. *Trico Products Corp.*, 238 NLRB 1306 (1978), and cases cited therein. I so find and conclude.

Finally, I reject Respondents' argument that the complaint herein is barred by Section 10(b) of the Act. The charge in this case was filed on July 1, 1987, and amended on July 23, 1987. As found above, Respondents attempted to enforce the expired collective-bargaining agreement as late as the March 1987 request to discharge an employee named Rogers, less than 4 months before. Such a request constitutes an independent violation of the Act. *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988).

It follows from the above that I should, as I hereby do, find that by initiating grievances against an employer which had effectively repudiated its collective-bargaining relationship with the Respondents, in an effort to enforce the union-security provisions of an expired collective-bargaining agreement, Respondents violated Section 8(b)(1)(A) and (2) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondents set forth above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to industrial strife burdening and obstructing commerce.

V. THE REMEDY

Having found that Respondents have engaged in, and are engaging in, unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act, I shall order them to cease and desist therefrom, and to take certain affirmative actions designed to effectuate the policies of the Act.

On the basis of the foregoing findings of facts and on the entire record in this case, I reach the following

CONCLUSIONS OF LAW

1. The Employer, Marina Concrete Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local and Respondent District Council are labor organizations within the meaning of Section 2(5) of the Act.

3. Inasmuch as Respondents initiated proceedings based on the union-security provisions of an expired collective-bargaining agreement and against an employer which had effectively reputiated its collective-bargaining relationship with them, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions[8] of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondents, District Council of Plasterers and Cement Masons of Northern California, and Cement Masons Local 337, both affiliated with Operative Plasterers and Cement Masons International Association, their officers, agents, and representatives, shall

1. Cease and desist from initiating or prosecuting grievances against employers, including the Employer, based on the union-security provisions of an expired collective-bargaining agreement, or against employers, including the Employer, which have effectively repudiated their collective-bargaining relationship with the Respondents.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Cancel all such outstanding grievance procedures against the Employer.

(b) Reimburse the Employer and/or Granite Construction Company for any moneyes which have been collected, if any, pursuant to the grievances filed by Respondents.

(c) Subject to the interim records preservation requirements set forth above in item (b), permanently remove from its union files and records all references to grievances filed against the Employer and/or Granite Construction Company, based on the employment by either employer of employees Ron Bell and/or James Dennis Rogers.

[7] In addition to the previously mentioned letters in April 1986, the Employer affirmatively advised Respondent Local, through its agent, Philip Nelson, that it was no longer a union contractor. Further, in its sarcastic letter in response to the first grievance, the Employer's intent was clearly conveyed, i.e., it considered itself a nonunion employer ever since the Respondents failed to respond to its offer to bargain individually made in the April 25, 1986 letter.

[8] All outstanding motions inconsistent with the results of this decision, if any, are overruled.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Immediately notify the employees, Ron Bell and James Dennis Rogers, that any disciplinary proceedings, grievances filed or actions taken employers based on their employment of Ron Bell and/or James Dennis Rogers, as set forth above, are of no force and effect, and that internal union files and records will be purged of any references to such proceedings or actions as soon as permission is obtained from the Regional Director for Region 32.

(e) Post at its facility copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

(g) Return any fines, with interest, to the Employer and/or its Construction Company collected from either of them pursuant to any such grievance proceedings.

(h) Notify, in writing, Marina Concrete Company and Granite Construction Company that Respondents have no objection to employees Ron Bell and/or James Dennis Rogers working for it/them.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''